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Changes, Delays and Other Claims

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The modern construction project is so marvelously complex that it is amazing that anything ever gets built. Projects have a multitude of players, including owners, architects, engineers, the government, the general contractor and a multitude of subcontractors and material suppliers. "Differing conditions" can impact the start, middle or end of a project. An excavator never knows how much solid rock will be beneath the surface until they start digging. In renovation projects, we never know what is behind the walls until they are torn down. Unrelated third parties, not involved in the construction process, can delay a project, including labor union strikes, war, terrorism or trade embargos. Acts of God, including severe weather or earthquakes, can occur that are no one's "fault."

The beauty of this process—and the problem—is that all of these players are human beings that can misjudge and make mistakes. With so many individuals involved, it is amazing any project ever is completed. Construction projects are almost always eventually completed, however, because of the experience, hard work, tenacity and perseverance of all the people involved.

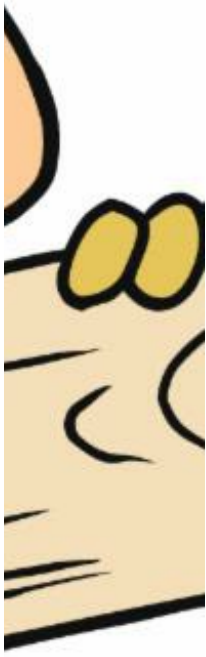
Risk Allocation

Things are going to happen. The only thing we know with certainty is that

the unexpected will occur. We just do not know what, when and who is going to pay the cost.

Changes in scope and project delays can create great costs to all players in the project. The process of risk allocation for these costs begins in contract negotiation. Owners, contractors and other players in the construction process decide who will pay the costs of problems when they negotiate a contract or when they simply decide to sign whatever contract form has been handed to them.

Clients call their lawyers constantly, telling detailed stories of problems on a construction project and asking for "the answer." What happens? Who will bear the costs? What should I do? Most of the time, these questions are answered with another question: What does your contract say?



Most of the questions regarding claims on a construction project are answered in the contract documents. This is sometimes referred to as the "Big Boy Rule." The parties to a construction contract are sophisticated business professionals. They are familiar with the construction process and the risks involved. They are capable of reading risk allocation provisions in their contracts, and a court will generally require them to live up to their contract. This is particularly true in a "strict construction" state such as Virginia.

The parties generally agree to what the "law" will be on this construction project when they negotiate contract terms. There are very few laws or "statutes" passed by the legislature that will relieve a contractor or owner from their agreed contract terms. One exception is "consumer" or home improvement contracts, where there is unequal experience and sophistication in construction matters.

"Changes" or "Claims" provisions in a contract will often control whether a contractor is entitled to additional time or money on a project and will dictate the procedure to follow in order to obtain that time or money. "Conduit" clauses in a subcontract will often "incorporate" the general contract terms into the subcontract, requiring the subcontractor to follow the changes, claims and dispute resolution procedures in the general contract to get additional time or money resulting from owner action. A "pay when paid clause" in a subcontract can control when or even whether a subcontractor can collect extra money for changes. "Differing" or "Concealed condition" clauses allocate the risk of unknown conditions on a construction site. These are all "risk allocation" contract provisions.

Preventing Problems

Communication and coordination are critical to prevent problems on any construction project. The need for communication and coordination drive many of the contract terms requiring notice of claims and complete information on the cost and time impact at an early stage. These notice provisions will be strictly enforced as a general rule. Sometimes this seems very unfair to a contractor that has incurred extra expenses or been delayed. An owner or general contractor, however, is entitled to know and has good reason to require clear communication that an event has occurred and exactly what the time or cost impact will be.

Communication may enable an owner to alter course by rescheduling or redesigning. There are often good faith disputes about what is in the scope of the contract. One person's change is another person's clarification.

Documenting Claims

When delays or other problems occur, notice should normally be in writing, through letters, electronic mail and progress meeting minutes. Written notices promote clarity and allow all parties to pass on more complete information to all the players in the project. Written notices are also normally required pursuant to most construction contracts in order to preserve rights to time extensions or additional funds.

When projects are delayed or other claim costs are incurred, the players with the most complete documentation will have a tremendous advantage. This starts with written notices describing the time and place that problems occurred. Regularly kept daily reports will corroborate the circumstances surrounding the problem, show the personnel and equipment impacted, help establish the impact on the schedule as planned and evidence the costs incurred. Constant and consistent photographing is invaluable as an easy, inexpensive and thorough method of describing conditions.

In addition to sending your own notices, it is often important to respond to notices received. Likewise, it is often important to visit the site to view and photograph the condition before another player "cures" the alleged defect. You should review progress meeting minutes and object to entries that are inaccurate. In the event of litigation, having "the facts on your side" is certainly important. It is equally important, however, to have good evidence to support your facts.